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FILED

JAN 25 2010

**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

**DIVISION'S MEMORANDUM
IN REPLY TO
PETITIONERS' MOTION FOR
LEAVE TO CONDUCT
DISCOVERY**

Docket No. 2009-019
Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through counsel hereby submits the following Memorandum in Reply to Petitioners' Motion for Leave to Conduct Discovery.

PROCEDURAL BACKGROUND

1. The Division's decision on the Alton Coal Development, LLC (ACD) application was issued after completion of a thorough analysis of the application involving numerous exchanges of submittals, reviews and revisions over a period of three years and four months; from the date of the initial submittal on June 27, 2006 until approval on October 19, 2009. Thousands of pages

of documents have been exchanged in order to arrive at the final application; thousands of conversations have been documented including consultations with staff, ACD's consultants and other agencies before the Division reached the final review and approval of the modified permit application and the final decision with findings.

2. The result of this process has been to assemble an application that addresses each of the requirements of the Coal Act and its regulations. The beginning submissions and the intervening submissions and decisions have been supplanted by subsequent submissions and are not part of the final approved application. The earlier versions and analysis is no longer meaningful except as a history of the application review process. This history includes some instances of error and revisions on behalf of both ACD and the Division based on mistakes or misunderstandings, but the history also shows how the application was improved until it was determined to satisfy the regulatory requirements.

4. The Division has maintained a full and complete public record of the documents generated as part of this application review process in the Public Information Center (PIC) at the Division's offices in Salt Lake City, Utah. The information contained in the PIC files is open to public inspection and copying and is also available on line. A CD containing electronic copies of all of all of the information contained in these public files has been provided to counsel for the Petitioners and ACD.

5. These files include all of the documents that have been generated during the three years and four months that were a significant part of the Division's review and decisions on this application including all pertinent correspondence and documents related to the application, all information and reports submitted in support of the application, all of the Divisions' reviews and

responses to the correspondence and documents submitted, and all subsequent revisions, reviews and responses by the ACD and the Division.

6. These public records contain all reports of visits to the proposed area, records of all meetings with the applicant, its consultants, and other state and federal agencies and all correspondence with those consultants and agencies. The files also include the minutes of meetings, summaries of Division's evaluations, pictures of the proposed locations taken by the Division, and records or internal reports of the Division generated as part of its investigations and reports.

7. The Division's public record files also include copies of all relevant email correspondence and transmittals except for non-significant exchanges of greetings, confirmations, scheduling of meetings and similar non-significant exchanges as determined by the Division's employees in conformance with its policies.

ARGUMENT

1. THE BOARD HAS ABSOLUTE AUTHORITY TO GRANT OR DENY A RIGHT TO CONDUCT DISCOVERY, AND TO SET THE EXTENT AND MANNER OF DISCOVERY IF IT DETERMINES THERE IS GOOD CAUSE.

The Utah Administrative Procedures Act under its designation of procedures for formal adjudicative proceedings states: "(1) [I]n formal adjudicative proceedings, the agency may by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claim or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure." Utah Code §63G-4-205 (2010)

In accordance with this general provision for all state agencies, the Board has enacted rules that prescribe the means of discovery for matters to be heard before it though its rules at Utah Admin. Code R641-108-900. This Board rule: (1) requires the motion of a party; (2) requires a showing of good cause; and (3) provides that the Board *may authorize such manner of discovery* against another party (including the Division) as may be prescribed by the Utah Rules of Civil Procedure (URCP).

The language “may authorize such manner” as used in this rule is not surplus but grants the Board authority to set limits on the extent and manner of discovery. The right of an agency to set limits on the rights to use of discovery in a formal adjudication including the right to deny discovery was upheld in *Beaver County v. Utah State Tax Commission*, 916 P.2d 344, 352-353, (Utah 1996); and *Petro-Hunt, LLC v. Department of Workforce Services*, 197 P. 3d 107 (Utah 2008). In *Beaver County*, the court clearly stated the law that “discovery in administrative proceedings is available only if governing statutes or agency rules so provide” (at page 352, citations omitted). The court upheld the Public Service Commission’s order denying discovery based on its policy that only allowed discovery of information presented to the commission and denied discovery that sought additional information from the opposing party in the case.

In *Petro-Hunt*, the Court upheld the agency’s denial of discovery based on an agency rule that limited the right to discovery in order to avoid delay and minimize costs. The rule allowed discovery only if informal discovery was inadequate, there was not other available alternative that would be less costly or intimidating, it was not unduly burdensome, it was necessary to properly prepare and it would not cause unreasonable delay.

This Board’s authority to limit the manner and extent of discovery has been recognized and applied by it in formal adjudications similar to this matter. Most recently, in *Lila II*, (SUWA

v. Division, Docket 2007-015, Cause C/007/013-LE07) the Board's order permitting discovery (Attached as Exhibit 1) expressly provided that it did "not authorize discovery methods to the fullest, most extensive degree they might be used in civil litigation in state courts, but [the board] will place some limitations on their use pursuant to its ability to regulate discovery under R641-108-900 and Utah Rules of Civil Procedure 26(b)(1) and 26(b) (2)." (Exhibit 1, p. 10, citations omitted.) Although the Board's Order in Lila II refers the discretion afforded trial courts to oversee discovery pursuant to Rule 26(b) of the URCP, the Board's discretion is not bound by the Rule 26(b) language or case-law. There is no question under the authority of *Beaver* and *Petro-hunt*, supra, that the Board may **deny** discovery in its administrative hearings based on its view of good cause. Accordingly, it must be conceded that the Board's authority to **limit** the extent and manner of discovery is very broad and is greater than that of a court in a judicial context under rule 26(b) URCP where there is a right to discovery in accordance with the URCP. The URCP and decided case may be instructive to the Board in determining when to allow discovery, but the Board is not bound or limited by the URCP or the case law as it determines if and what manner of discovery is necessary in a given administrative hearing.

2. THE BOARD HAS DEVELOPED CRITERIA FOR DETERMINING IF THERE IS GOOD CAUSE FOR DISCOVERY AND FOR DETERMINING THE EXTENT AND MANNER OF DISCOVERY IT WILL ALLOW.

In Lila II, the Board looked at a number of factors that pertain to a board review of a permit decision and that may affect the amount of discovery permitted. Specifically, the Board identified as important considerations: (a) the opportunity for public participation and the public nature of the record and process, (b) the administrative nature of the hearing, (c) the time within

which the matter is to be adjudicated, (d) the limitations of the parties' resources (including those of the Division with limited staff), and (e) the overall needs of the case. (See Order, page 9). In this matter there is an exhaustive public record that is fully available and contains all of the information that is being challenged. As with all matters before the Board, this is not a judicial appeal but intended as forum for a just, speedy and economical determination of these technical issues. in order to accomplish these purposes as with the agency in Petro-Hunt, there is justification to avoid re-examining the entire permit process. There is a presumption of validity and the burden in on the Petitioners to show error in the final decision. This does not mean they should be able to review through discovery the entire three-year process. At the least the Board should make reasonable time and other limits that result in a self-imposed efficiency on the use of discovery.

Any discovery allowed by such an order should be limited in a manner that will assure that the parties do not abuse the right to conduct discovery. All discovery is of course limited to matters relevant to the subject matter of the adjudication; and should not be unreasonably cumulative or duplicative or unduly burdensome. See Utah Rules of Civil Procedure 26(b) and *Ellis v. Gilbert*, 429 P.2d 39, 40 (Utah 1967) and *Bennion v. Board of Oil, Gas and Mining*, 675 P.2d 1135, 114 (Utah 1972).

Requests for production of documents beyond those provided by the Division's public record and identification of persons to be deposed and questions at depositions should be limited to documents and questions that pertain to the claims that are supportable by the law and facts as raised in the pleadings. For example, the request for information about a meeting with the Governor (where it is admitted the status of the permit review was discussed in September 2009) is not relevant and is improper area for discovery unless there is a demonstration that the

information provided in the application or the Division's findings were altered or changed improperly after such a meeting. A 'fishing expedition' into such highly controversial allegations based solely on suspicion and innuendo is too broad and would have no limits since such allegations of improper influence could be made for all witnesses based on any manner of alleged influence. First, there must be a basis in the record to support inquiries that are otherwise based only on outrageous allegations of improper conduct. If such baseless allegations or inquiries were to be the boundary for discovery, then all of the communications of all employees and consultants would be subject to inspections and deposition to see if there was any undue influence on their decisions.

The Board's order should also limit the discovery requests regarding alleged deficiencies to cases where the allegations, if true, would support a claim. When there is no basis in law for the Petitioners' claims, even if true, there is no basis for permitting the delay and expense imposed by the burden of complying with discovery. For example, prior to allowing discovery regarding damages allegedly caused by the impact of the mining on visibility of the night sky there is a burden to demonstrate that such impacts are within the regulatory authority of the Coal Act. Similarly, assuming the Division's motion to dismiss is granted there is no reason to allow discovery concerning the effects of coal truck traffic on hydrology and cultural resources in the City of Panguitch.

The Division identifies these three examples of improper discovery contained in Petitioners' discovery requests in order to illustrate that discovery must be reasonably related to claims that are at least potentially viable based on the law and facts as alleged. The Division believes it is premature to file formal objections to specific requests until the Board rules on the Petitioners' Motion for Leave to Conduct Discovery and established limits on the extent and

manner of discovery, if any it will allow. The Division reserves the right to object to the specific requests for documents and designations of persons to be deposed after the Board has ruled.

3. THE BOARD SHOULD FASHION A DISCOVERY ORDER BASED ON MANDATORY INITIAL DISCLOSURES AND A LIMITED RIGHT TO MAKE SUPPLEMENTAL REQUESTS FOR DOCUMENTS AND TAKE DEPOSITIONS OF WITNESSES

The Board, in Lila II acknowledged that there had been an initial disclosure of a “record” and provided that the Division may refer to the record in response to request for documents. The Board also established a schedule for the initial disclosure of witnesses (with summaries of testimony), an exchange of final witness lists, a statement of qualifications and reports, if any, of experts and summary of testimony for experts, and a deadline for completion of discovery. The Order also limited the number of hours allowed for depositions. This scheduling and disclosure order provided for the disclosures needed for the hearing without compromising the goals of efficiency, timeliness and economy that an administrative hearing is designed to allow.

CONCLUSION

The Board should establish a similar order in this case requiring each party to make initial disclosures of the documents and witnesses they will rely on to present their case and to make a defense, and a timely disclosure of expert witnesses and reports, if any. After compliance with such an order, the Board might then provide an opportunity for supplemental requests for production of documents, and a limited amount of time for depositions of witnesses. Such additional requests and depositions will allow the parties to preview testimony and prepare

for the hearing and will provide for the most efficient use of time allotted for testimony before the Board.

Respectfully submitted this 25th day of January, 2010



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CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing REPLY TO MOTION FOR LEAVE TO CONDUCT DISCOVERY, to be sent by electronic transmission and to be mailed by first class mail, postage prepaid, the 25th day of January, 2010 to:

electronic copies sent

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Attachment 1

Board's 9/05/07 Order concerning
Discovery in Lila II

FILED

SEP 05 2007

SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

**SOUTHERN UTAH WILDERNESS
ALLIANCE,**

Petitioner,

vs.

DIVISION OF OIL, GAS & MINING,

Respondent,

and

UTAH AMERICAN ENERGY, INC.

Respondent-Intervenor.

ORDER CONCERNING DISCOVERY

**Docket No. 2007-015
Cause No. C/007/013-LCE07**

This cause came on regularly for hearing before the Board of Oil, Gas and Mining (the "Board") on August 22, 2007, at 10:00 a.m., in the Hearing Room of the Utah Department of Natural Resources at 1594 West North Temple Street, in Salt Lake City, Utah.

The following Board members were present and participated in the hearing: Acting Chairman Robert J. Bayer; Samuel C. Quigley; Jake Y. Harouny, and Jean Semborski.

Stephen H.M. Bloch appeared as counsel for Petitioner Southern Utah Wilderness Alliance ("SUWA"). Steven F. Alder and James P. Allen, Assistant Attorneys General, appeared on behalf of Respondent the Division of Oil, Gas and Mining. Denise Dragoo appeared as counsel on behalf of Respondent-Intervenor Utah American Energy, Inc. ("UEI"). Michael S. Johnson and Stephen Schwendiman, Assistant Attorneys General, represented the Board.

The Board heard oral argument on the discovery-related questions addressed by the parties in the following briefs:

- Petitioner Southern Utah Wilderness Alliance's ("SUWA's") Motion for Leave to Conduct Discovery;
- The Division of Oil, Gas and Mining's ("DOGM's") Motion for Discovery and Memorandum Supporting Motion for Discovery;
- Intervenor-Respondent's ("UEI's") Joinder In Respondent's Motion For Discovery and Supporting Memorandum;
- SUWA's Reply in Support of Motion for Discovery and Response to Division and UEI Motions for Discovery;

NOW THEREFORE, the Board, having considered the above-listed briefs and the oral arguments made by the parties at the hearing, and good cause appearing, hereby rules as follows:

The Utah Supreme Court has recognized that an agency may specify and define the availability of discovery through rulemaking. *See Beaver County v. Utah State Tax Commission*, 916 P.2d 344, 352-353 (Utah 1996).¹ The Board has promulgated Utah Admin. Code R641-108-900, which provides that "[u]pon the motion of a party and for good cause shown, the Board may authorize such manner of discovery against another party, including the Division or the Staff, as may be prescribed by and in the manner provided by the Utah Rules of Civil Procedure." Any form of discovery is therefore available in Board proceedings provided the Board finds good

¹ If an agency's rules do not address discovery, the Utah Administrative Procedures Act ("UAPA") provides that parties in formal adjudicative proceedings may conduct discovery pursuant to the Utah Rules of Civil Procedure. Utah Code Ann. §63-46b-7(1). By contrast, discovery is prohibited in informal adjudicative proceedings. Utah Code. Ann. §63-46b-5.

cause exists to authorize such discovery.

The Parties Agree That Good Cause Exists For Discovery.

Due in large part to the uncontested nature of most proceedings before the Board, discovery is rarely requested or authorized. The present case, however, is rare not only in its contested nature but in its complexity and the fact-intensive nature of the disputed issues. Consequently, all parties agree that good cause exists for the authorization of at least some discovery in this case. The only dispute concerns which varieties of discovery are warranted. While SUWA argues that all methods addressed in the Utah Rules of Civil Procedure should be authorized, the Division and UEI suggest that the Board authorize a form of partial discovery in which depositions are permitted but written discovery (and in particular SUWA's proposed document requests) are barred. While such an approach might be sufficient and appropriate in some cases, for the reasons discussed below, the Board does not find that discovery should be so limited in this matter.

Document Discovery Is Of Particular Importance In This Matter.

The present matter comes before the Board following the Board's 2001 review and reversal in *Lila 1*² of the Division's granting of a permit for the same mine. *Lila 1* saw considerable disagreement over the completeness of the body of documents assembled by the Division in that matter. This is true despite the Division's production in *Lila 1* of an administrative "record" which it certified as complete. The present case is therefore unusual in that it has already been the subject of significant controversy over document disclosure and production, which controversy was resolved in *Lila 1* in part through the voluntary conducting of

² Docket No. 2001-027; Cause No. C/007/013-SR98(1).

discovery.³ Where the parties are in agreement that some form of discovery is warranted, the history of controversy discussed above argues against the exclusion of document requests as an available method for conducting that discovery.

It is also worth noting that the Board's decision in *Lila 1* was premised in part on its review of documents which had not been included in the Division's initial assembly of its record but which the Board found would have been considered by the Division in making its decision. *See* Findings of Fact, Conclusions of Law and Order dated December 14, 2001 at 7 (admitting into evidence exhibits falling into this category). This further underscores the appropriateness of some measure of document discovery permitting inquiry into documents beyond what the Division has voluntarily produced.

The Scope of Review And Nature Of Formal Adjudicative Proceedings Favor Discovery.

The scope of review applied by the Board in this matter makes discovery more appropriate here than in *Lila 1*. As discussed in the Board's August 9, 2007 Order, the Board in *Lila 1* limited its review to the documents found within the "record" of the Division's informal proceeding. The limited, on-the-record scope of review employed in *Lila 1* made document discovery less necessary, and indeed the Division and UEI stressed this fact in opposing SUWA's discovery requests in *Lila 1*. In the present case, however, the Board has held that it will review not only evidence contained within the informal record below, but other relevant

³ The controversy which arose in *Lila 1* concerning document production resulted in the filing of several discovery-related motions and accompanying discovery requests. Ultimately, despite their disagreement over whether discovery should be authorized by the Board, the parties in *Lila 1* in fact conducted voluntary, document-related discovery activities. In response to certain of SUWA's requests in that case, the Division both stated objections and produced documents beyond its initial "certified record." Because SUWA thereafter did not move to compel any further production, those discovery requests were ultimately resolved without Board action. *See*

evidence the parties may offer into evidence in order to generate a record adequate for judicial appellate review. *See* Order dated August 9, 2007 at 8-14. In supporting this broader scope of review, the Division argued that it is not required to certify a complete administrative record, and that even if such a record could be prepared, it would be “inadequate to support the requirements of review, and [additional] evidence must be allowed.”⁴ The Board agreed with the Division and directed it to initially produce only the basic permit decision documents and any other documents “the Division deems relevant” to the issues in dispute. Minute Entry dated July 12, 2007 at 2-3. Because this ruling obligated the Division to initially produce a lesser set of documents than in *Lila I*, to be limited by the Division’s own judgment as to relevance, the Board further instructed the Division to “assemble all other documents pertaining to the permit at issue as well as the process which led to the issuance of such permit, so that such materials may be readily produced in response to discovery requests.” *Id.* at 3. The Board’s ruling concerning the appropriate scope of review in this formal adjudication therefore obligates the parties to themselves obtain the documents they wish to offer into evidence rather than relying on any pre-existing “record,” and is more consistent with the availability of some measure of document discovery than was the

Findings of Fact, Conclusions of Law and Order dated December 14, 2001 at 4.

⁴ Division’s Memorandum Regarding Conduct of the Hearing dated June 18, 2007 at 6. In addition to the need to generate an adequate record, the Division noted the “need for the Board to be fully informed” and the requirements of the “statutes and rules mandating a full evidentiary hearing” as factors arguing against a limited, on-the-record review. *Id.* at 5. The Board views these factors as generally supporting some measure of written discovery in this particular case as well.

Board's scope of review ruling in *Lila I*.⁵

Good Cause Exists To Authorize Written Discovery In This Case.

Given the complexity of this case, the fact that document production was a significant contested issue in *Lila I*, and the fact that the Board's August 9, 2007 Order obligates the parties to themselves obtain the documents they wish to offer into evidence rather than relying upon a certified record, the Board finds that entirely excluding written discovery (and document requests in particular) would be inappropriate. This is especially true where the parties agree that good cause exists for the authorization of at least some forms of discovery.

While the parties acknowledge that "good cause" as used in Utah Admin. Code R641-108-900 is not defined by rule and has not been construed by any court, they cite *Jackson v. Kennecott Copper Corp.*, 495 P.2d 1254 (Utah 1972) as persuasive authority to supply a definition of "good cause." *Jackson*, however, analyzed the meaning of "good cause" under a former version of Utah Rule of Civil Procedure 34 pertaining solely to document requests, and did not analyze what constituted "good cause" for an administrative tribunal to authorize the use

⁵ As discussed at length in the Board's August 9, 2007 Order, statutory and decisional law dictate that the Division's informal proceeding be reviewed by this Board via a formal adjudicative proceeding under UAPA for a variety of reasons. Order dated August 9, 2007 at 8-14. The development of a record adequate for purposes of Supreme Court appellate review through formal proceedings of which discovery may be an appropriate part has been recognized by Utah courts as supporting formal review of informal agency decisions: "UAPA's statutory scheme ensures that 'each applicant has the opportunity to have a formal hearing before the agency, or a [trial] de novo by the district court.' One reason for this statutory scheme is that appellate courts need a complete record in order to review adjudications. Formal proceedings 'allow the opportunity for fuller discovery and fact finding, [and] are more likely to result in an adequate record for review.'" *Cordova v. Blackstock*, 861 P.2d 449, 451-52 (Utah 1993).

of various methods of discovery pursuant to the discretion afforded it under its own rule.⁶ Even if *Jackson* is instructive, however⁷, the Board finds that the factors discussed therein are met given that SUWA's proposed requests seek categories of documents which are relevant to the

⁶ The former "good cause" requirement codified in Rule 34 and analyzed in *Jackson* was applied by courts in large measure as a means of affording parties protection from having to produce documents created in anticipation of litigation, and was removed from the rule when the more specific work-product doctrine protections of Rule 26(b) were implemented. See Advisory Committee Notes to Federal Rules of Civil Procedure 26 and 34 (discussing 1970 amendments to those rules and the relationship between Rule 34's former "good cause" requirement and work product doctrine concerns which are now addressed in Rule 26(b)(3)) (Utah adopted the 1970 amendments to these federal rules in its own rules in 1972). See also 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d §2205. Aside from *Jackson*'s analyzing a different "good cause" rule (with a somewhat different underlying rationale) than the rule at issue here, it should be noted that the old discovery rules at issue in *Jackson*, while they imposed a "good cause" requirement for document requests, presumed the availability of other forms of written discovery. In fact, it was only because the plaintiff in *Jackson* was able to conduct written discovery via interrogatories that it even knew of the existence of the documents it sought to obtain through document requests. *Id.* at 1255. *Jackson*'s "good cause" analysis of how necessary such documents were to the proof of the plaintiff's case was only possible because the documents' existence and basic content were first ascertained through written discovery. To apply a "good cause" analysis identical to that applied in *Jackson* to the present case in which all forms of written discovery are opposed, and where even the existence of additional relevant documents has not been probed through discovery as it had been in *Jackson*, therefore seems inappropriate. The Board does not read its own "good cause" rule as requiring that result. While the depositions proposed by the Division and UEL would permit some exploration of the existence of additional documents, interrogatories and document requests are better means of discovering this information, and the Board sees no reason to issue a discovery order which bars the use of these discovery methods, or which delays the use of document requests as might have been required under the old, now-abandoned Rule 34 analyzed in *Jackson*.

⁷ While the Division notes that the Utah Court of Appeals has discussed *Jackson*'s "good cause" analysis in the context of another Board rule in *Road Runner Oil, Inc. v. Bd. of Oil, Gas & Mining*, 76 P.3d 692, 696 (Utah Ct. App. 2003), it should be noted that the rule at issue there did not involve discovery, and the *Road Runner* Court cited *Jackson* only for the proposition that the Board's "good cause" findings are heavily dependent upon the facts of each individual case and that the Board consequently enjoys a "wide latitude of discretion" in making such findings. *Id.*

subject matter of this Cause which are in the exclusive possession of the Division and UEI.⁸ The *Jackson* “good cause” discussion, which recognized the overriding concern of ensuring the “full, accurate disclosure of facts,” the case-by-case nature of the “good cause” inquiry, and the “wide latitude of discretion [which] is necessarily vested” in the tribunal, in the Board’s view supports a finding of good cause for authorization of written discovery under the particular facts of this case. *Id.* at 1255.

Prior Voluntary Production of Documents Will Reduce The Burden Of Responding To Document Requests But Does Not Eliminate The Appropriateness of Such Requests.

The Division has indicated that it has already gone beyond what was called for in the Board’s July 12, 2007 Minute Entry and August 9, 2007 Order, and has voluntarily produced a substantially complete set of documents pertaining to this matter, including all relevant documents contained within the Division’s public information center (or “PIC”). While this laudable effort undoubtedly puts the Division far ahead of the game in responding to document requests, it does not wholly eliminate the appropriateness of such requests. The Division’s voluntary effort was necessarily guided by its own assessment of the relevance and importance of the documents in its possession. It was SUWA’s disagreement with the Division’s document screening and selection process in assembling its informal record which led to the considerable document-related controversy in *Lila 1*. To the extent that similar disagreements now exist, reliance only on the Division’s voluntary assembly of documents or filing of documents in the PIC does not permit such disagreements to be adequately addressed or resolved.

⁸ The *Jackson* Court ultimately held that “good cause” was shown where “the documents sought all related to the subject matter of the interrogatories and the central issues of the action and were solely in the possession and/or knowledge of the defendant.” *Id.* at 1256. The same statements concerning the basic relevance of the categories of documents sought and the

The Division's argument that the relevant documents are not scattered among many parties, but are concentrated in the Division's files, merely underscores that such documents are within the exclusive control of SUWA's party opponent. The Division's assertion that it has voluntarily produced all relevant documents, even if likely true, does not negate the appropriateness of authorizing SUWA to probe through a formal discovery request whether such voluntary production was indeed complete. The assertion that most or all responsive documents have been previously produced also indicates that the Division should have to expend little effort in responding to such a document request. Counsel for the Division underscored this at the hearing when in answer to an inquiry he indicated that responding to SUWA's proposed document requests would largely involve merely referencing the prior voluntary production, rather than producing any significant quantity of responsive documents which had not yet been produced.

The Board Will Impose Reasonable Limits On Discovery Given The Needs of This Case And The Relatively Short Timeframe Within Which The Matter Will Be Adjudicated.

As noted by the Division, SUWA has been a full participant in the Division's permit review process, has attended meetings and participated in informal conferences, and is very familiar with the issues in dispute. This places SUWA in a position of superior knowledge when compared with many litigants in court cases. Furthermore, although not wholly eliminating the appropriateness of discovery, the public nature of the Division's process and most of the related documents reduces the extent of necessary discovery here. In recognition of these realities, the administrative nature of the hearing, the comparatively short timeframe within which the matter will be adjudicated, the limitations on the parties' resources (including those of the Division with possession of those documents by opposing parties can be made in this case.

documents, the Division may certainly refer to such prior production in its responses to SUWA's document requests. While the Utah Supreme Court has recognized in a case originating with this Board that the production of complex records without some kind of explanatory material or summary may be problematic, *see Bennion v. Board of Oil, Gas & Mining*, 675 P.2d 1135, 1144 (Utah 1983), if the index provided by the Division permits the produced documents to be reasonably understood and searched, the Division's prior production may be deemed adequately responsive to SUWA's requests without the Division providing any further specification of Bates number ranges or other breakdowns of the produced materials. *See id.* (recognizing Board's discretion in regulating manner in which parties may be compelled to respond to discovery requests and determining what discovery practices are "fair and effective in the circumstances of the pending controversy"); Utah Rule of Civil Procedure 26(b)(2) (setting forth power of a tribunal to appropriately shape the use of discovery methods).

For the reasons set forth above, the Board grants the discovery motions of SUWA, the Division and UEL, and authorizes the use of depositions, interrogatories, requests for admissions and requests for production of documents as methods of discovery. While the parties' motions did not propose the same discovery methods, any party to this matter may utilize any method of discovery authorized herein. The Board further orders that:

1. Initial witness lists, with accompanying summaries of the expected subjects of the

¹² Although the Board finds that some measure of discovery is warranted, given the factors discussed above, the Board will ensure that the process does not get out of control and exceed the needs of this case. The Board will rule on discovery disputes which might arise with an eye toward restricting the use of the various discovery methods to within reasonable parameters. *See State By and Through Road Comm'n v. Petty*, 412 P.2d 914, 918 (Utah 1966) (noting "discovery should not be extended to permit ferreting unduly into detail" or "distorted into a 'fishing expedition' in the hope that something may be uncovered").

witnesses' testimony, will be exchanged by September 12, 2007. Final witness lists will be exchanged by November 1, 2007;

2. A statement of the qualifications of each expert who will testify, copies of such experts' reports, if any, and, if no reports are provided, a summary of such experts' expected testimony, will be exchanged by October 17, 2007;

3. Discovery shall be completed by November 16, 2007;

4. Pursuant to Utah Rule of Civil Procedure 30(d)(2), the Board modifies the general rule that depositions be limited to one day of seven hours and specifies that a deposition may be continued and a portion of such seven hours reserved for follow-up questions which may arise after additional documents have been produced. This will permit the parties to commence depositions immediately but allow some flexibility for any follow-up questioning which may become necessary in light of additional documents which may be produced after a deposition.

5. The parties are invited to submit to the Board for resolution motions to compel, objections to discovery requests, or other discovery-related matters. Such matters may be submitted at any time, and the Board authorizes its Chairman to rule upon such motions and objections on a continuing basis between regularly-scheduled Board hearing dates.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ENTERED this 5th day of September, 2007.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING


Robert J. Bayer, Acting Chairman

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER via United States mail, postage prepaid, this 6 day of September, 2007, to the following:

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